No. 2711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED (a corporation),
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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We shall not attempt any detailed reply to the voluminous brief on behalf of defendant in error. That it should be necessary to answer our fifty-nine page brief by a brief of two hundred and thirty pages would seem to indicate some serious infirmity in the facts relied upon to support this judgment. Counsel have so interwoven the various points actually involved in the case that it is almost impossible to extract them from the confusion; but we shall attempt to follow the order of our opening brief and ascertain briefly what counsel have actually brought forward in answer to it.

I.

TOTAL LACK OF EVIDENCE TO SHOW ANY LIABILITY.

(a) In support of the claim that plaintiff supported the allegation that defendant failed to supply the decedent with a safe place to work, counsel now claim that, while the harvester and team and everything connected with it were all right, the place became unsafe because a cart came up which only had two wheels and no brake. This awful indictment that the cart only had two wheels is repeated at least three times in the brief. Carts generally only have two wheels and generally have no brakes, and there is neither pleading nor evidence indicating that it is usual that they should be equipped with more wheels or with brakes. And then, in a vain attempt to uphold a judgment on a ground neither pleaded nor proved, counsel refer to a case where a railroad was held liable because the brakes on a railroad locomotive were out of repair, and that was alleged and proved to be the cause of the injury (*Choctaw etc. Ry. Co. v. Holloway,* 191 U. S. 334). A contention of this kind without pleading or proof to support it is entitled to no further attention.

(b) Counsel practically admit that the allegation that the horse was a vicious horse was not established, but claim that it was "restive" or "frisky". Of course, all horses, generally speaking, have some of these characteristics in greater or less degree, but that does not make them outlaws or place them in the class of vicious animals *for whose conduct the owner is an insurer.* In other words, counsel claim that while they allege negligence, they need not prove it because they allege that

the horse was vicious to the knowledge of the defendant; it is held in the case of *Clowdis v. Fresno Flume Co.,* 118 Cal. 315, that under such a pleading plaintiff could base a recovery on that ground if the vicious character of the animal was shown and knowledge of the owner. But in this case, although no proof was offered of the vicious character of the animal and the proof admittedly showed it was not of that character, the court authorized a verdict on the ground of the absolute liability of the owner (Rec., p. 123), and plaintiff seeks to sustain the verdict on the same ground. Of course any characteristic of the horse may be considered in determining the question of *negligence,* but the question of absolute liability irrespective of negligence should never have been submitted to the jury, and can not be relied upon to uphold the verdict.

(c) *On the question of negligence* counsel refer to several matters which merit brief reply.

1. They claim that the cart had only two wheels and no brakes. As we have pointed out, the absence of wheels or brakes was not relied upon by either pleading or proof as constituting negligence, nor did the complaint in any way call attention to anything being wrong with the *cart.* The only complaint made was as to the character of the *horse.*

2. The next claim is that Twining was only sixteen and a half years old and therefore too immature to intrust with the duty of driving a horse and cart! Here again we have no pleading or proof that it was negligent to intrust a boy of that age with a horse and cart, but apparently the court is called upon to

determine from its judicial or other knowledge that such conduct does constitute negligence. Personally, I left the farm at twelve years of age and therefore do not feel competent to determine what a boy of sixteen and a half should be permitted to do on a farm. Before I was twelve I rode everything that was ridable and drove everything that was drivable, but I suppose if I had remained until I was sixteen and a half I would have only been considered safe when riding a hobby horse. I trust that some members of the court perchance may have remained on the ranch until they were older so they can appreciate and decide as a matter of law why it is that a boy of sixteen and a half years old is so helpless, and why any one who employs him to help him through high school is, without pleading and without proof, to be held guilty of negligence for doing so, and is also to be insulted by the suggestion that the reason that an able-bodied man was not employed was because it would cost more.

3. Counsel also suggest that Twining must have been guilty of negligence because he did not testify at the coroner's inquest or at the first trial. He was not asked to testify at the coroner's inquest (Rec., p. 111) and was ready to testify at the first trial but was not called because the defendant put in no evidence (Rec., pp. 110-111) and plaintiff made no case (see Opinion of Judge Farrington in Appendix to our Opening Brief).

4. Another claim is that he must have been guilty of negligence because he went away from the scene of

the accident. He went to report the accident to the foreman (Rec., p. 104).

5. Again counsel claim that he should have stayed back of the harvester instead of coming alongside of it. The evidence is that it was entirely safe and usual to come alongside of the harvester just as he did to get the count of the sacks. The witness Knight testified:

> "It is not an extraordinary or unusual thing at all to drive a cart up *alongside* of the machine for the purpose of getting the count of the sacks or for any other purpose" (Rec., p. 45).

Of course he might have stayed outside of the field, or trailed along behind the harvester where he would have been unseen and could not get the count, but if a person does just what is ordinary and usual he can not be said to be negligent.

6. Counsel place some emphasis on the fact that when Twining approached, Knight went to the brake. This is nothing unusual but is what is always done when any one approaches the harvester. Knight testified:

> "It is the usual thing I do when any one approaches the harvester. There is nothing unusual in that at all" (Rec., p. 47).

7. Counsel admit that Twining was walking his horse alongside of the harvester before it ran away (Brief, pp. 100, 106).

8. They also put some weight on the fact that Twining had the lines in his left hand. *He was left-handed* (Rec., p. 104).

9. Counsel attempt to *infer* that he had no experience and had never been to a harvester but once before. He had been doing this work for a month and a half (Rec., p. 99).

10. Counsel take several pages of their brief showing how exactly alike is the testimony of Salapi and Twining, and then when they find that in our brief we stated that there was no material difference between them on the material facts, counsel attempt to show marked discrepancies between them. We are willing to submit the case on the testimony of plaintiff's witnesses, or defendant's witnesses, or both. The case is not one of *conflict* of evidence, but *lack* of evidence.

11. After themselves questioning the testimony of Salapi and Albano because they were Italians (Brief, p. 67), counsel proceed to show how unfounded is that attack.

12. Counsels' final argument is the one that they have insisted on from the first, viz.: *that there is a presumption of negligence,* or upon the doctrine of *res ipsa loquitur.* We had supposed that this contention had been set at rest by the very able opinion of Judge Farrington, printed as an appendix to our brief. But counsel now claim that the decision in *Rowe v. Such,* 134 Cal. 573, holding that when a horse runs away with the driver there is no presumption of negligence, is not binding on the federal court. Assuming that it is not absolutely binding, it is in accordance with all the authorities on the subject, and counsel have not been able to find a single case to the contrary.

Counsel then seek to claim that the case of *Rowe v. Such,* supra, has been overruled. The first case they refer to in support of this contention is

Bauhofer v. Crawford, 16 Cal. App. 676,

in which the court held that where an automobile collided with a wagon the doctrine of *res ipsa loquitur* would make out a case, but said:

> "It is unlike the case of a runaway horse in charge or not in charge of his driver, causing injury, for in such a case it is as reasonable to infer that it was the negligence of a stranger as to assume it was that of the driver which caused the horse to run away.' In cases of that kind the rule fails, and the doctrine *res ipsa loquitur* can not be invoked (Rowe v. Such, 134 Cal. 573 (66 Pac. 862, 67 Pac. 700), and cases cited."

It will, therefore, be seen that this case not only does not overrule, but reaffirms, the case of *Rowe v. Such.* The next case relied upon by counsel is

Breidenbach v. McCormack Co., 20 Cal. App. 184.

In view of the fact that the Court of Appeal of California is an inferior court to the Supreme Court, it is not to be assumed that that court has attempted to overrule the Supreme Court, and an examination of that case will show that that decision not only does not overrule the case relied upon by us, but on the contrary strongly reaffirms it, and also shows that the decision is in accordance with the general rule adopted throughout the United States. In that case the plaintiff was injured by a runaway horse on the streets of Stockton and testified:

> "There was no driver on the wagon. I am positive of that" (p. 187).

Another witness testified that the horse had a rope on but the rope was not dragging but was tied up on the hames (p. 187). The contention of the plaintiff was

> "That the horse and wagon belonging to the defendant was running away unattended and the hitching strap was not loose and dragging but was fast to the hames. Everything therefore indicated negligence on the part of the defendants or their employees and we maintain the burden was thrown on the defendant to show that the horse was attended or properly secured, or that its running was wholly without fault of the defendants or their employees."

In upholding this contention the court said:

> "It was held by the Supreme Court in *Rowe v. Such*, 134 Cal. 573, that the rule in the Giant Powder case did not apply to the facts in the Rowe case. In that case which was relied upon by appellants the horse was not unattended; the driver was on the wagon at the time the horse started to run and he was thrown off the wagon. *There was no evidence showing the fault of the driver. All the facts were before the jury and there was nothing shown from which negligence could be imputed to the driver.* * * * The decisions are generally to the effect that the running away of a horse *where no driver is present* creates a prima facie case of negligence on the part of the owner. *Where, however, a horse runs away with his driver, it has been held that there is nothing in that fact itself to show negligence on the part of the driver.* (29 Cyc. 595.)
>
> "Generally negligence will not be presumed from the mere fact that a horse ran away unless the horse was unattended. (6 Thompson on Negligence, sec. 7665.)"

The court then proceeds to cite a considerable number of cases, all holding that where a horse runs away "unattended" there is a presumption of negligence and held that as that was the fact in that case, defendant was liable and the rule laid down in *Rowe v. Such* did not apply.

This case very clearly recognizes the distinction relied upon by us and which is based upon good sense and reason, namely: that if a horse runs away without the driver in attendance it must be assumed that the driver left the horse unhitched, or something of that kind; whereas, if the horse runs away while the driver is in the wagon, as in the case at bar, there is no presumption that the driver had done anything improper, but on the contrary so far as the evidence goes it would appear that he was doing just what he was required to do, and in that case there is no presumption of negligence whatever.

It therefore appears that not only has *Rowe v. Such* (decided in 1901) not been overruled, but has been reaffirmed, and this horse having run away *with* the driver "holding the horse pretty strong" (Rec., p. 36) and "holding the horse all he could" (Rec., p. 53) there is no presumption of negligence, and being no proof of negligence the verdict is unsupported.

II.

LACK OF ADMINISTRATOR'S BOND.

Counsel cite certain cases from other states holding that the absence of a bond does not render the letters void. The sufficient answer to this is that in this state it

is held to render them void. Counsel cite the case of *Abrook v. Ellis,* 6 Cal. App. 451, but that simply goes to the point that when the amount of the bond is fixed by the probate court, it can not be attacked collaterally on the ground that it is not in double the value of the property. The other case relied on is *Dennis v. Bint,* 122 Cal. 39, but it only holds that the absence of the seal on the letters does not invalidate them. It does not overrule the earlier cases holding that failure to give a bond renders the letters void, but simply refuses to "extend" those cases. It was not necessary to make this point in the court below, since it was a question of failure of proof and for aught that appears we may have made it in argument to the jury or on motion for new trial. We did make it in our answer (Rec., p. 26).

Nor can the claim of counsel be upheld that even if plaintiff is not administrator, still he may recover because he is a nominal party. If he is not administrator the judgment would not protect us against another judgment by the real administrator.

III.

NO PROOF OF HEIRSHIP.

Counsel having obviated the lack of an administrator, proceed to brush aside the necessity of heirs in the same way. They say that the failure to allege the heirs is waived if not made by demurrer. This may be true as to the *pleading* of heirs, but can not be true as to the *proof* of heirs. This distinction is observed by the

court in the case of *Texas & P. Ry. Co. v. Lacey,* 185 Fed. 225, relied upon by counsel, where it was held that failure to allege that a boy of eighteen was not married was waived, and that it was proved by the presumption that non-marriage continued as long as things of that kind generally continue and boys do not generally marry at eighteen. This is on the theory that defect in pleadings may be cured by verdict; lack of proof never can.

Counsel then rely as proof upon the probate records. Certainly the proceedings for letters are not evidence against third parties as to heirship. But the probate court did not find who the heirs were (Rec., p. 79), but the petition says that the heirs are Giuditta di Giovanni Petrocelli Spina and Assunta Spino, whereas the only person claiming to be widow was *Guiditta Petrocelli, and she did not connect herself at all with the man who was killed, nor did she testify that the child was his.*

Counsel next attempt to supply the missing proof by a "colloquy" between the court and the attorney for plaintiff. The first is a statement by counsel that he *intends* to call the widow and prove the facts by her (Rec., p. 85), and the next is a statement by counsel that the child "is his child" (Rec., p. 104). Certainly we were not bound by the statement of counsel of what he *intended* to prove or what he *thought* he had proved, and the court so instructed the jury (Rec., p. 122).

Counsel next contend that there was no contest in the court below as to heirship. The contest is evidenced by the pleadings in which we denied heirship (Rec., p. 26). Whether we did or did not argue the lack of proof

before the jury or judge can not be made to appear in the record.

Counsel in no way questions the insufficiency of the *evidence* to prove that the particular man who was killed was married to the alleged widow, Guiditta di Giovanni Petrocelli Spina or was the father of Assunta Spina.

This matter is not technical, for unless the parties are the real heirs we would not be protected by the judgment from an action in behalf of the real heirs.

IV.

NO ALLEGATION OR PROOF OF DIVERSITY OF CITIZENSHIP.

Counsel consume considerable space in trying to prove that Spin*a* and Spin*o* are *idem sonans,* but the question here involved is whether Jovetta Spino and Sunda Spino are *idem sonans* with Giuditta or Guiditta di Giovanni Petrocelli Spina and *A*ssun*t*a Spina; if not, there is neither pleading nor proof of their citizenship. By placing in juxtaposition these names, the entire lack of identity will be apparent:

Peter	Pietro
Spino	Spina
Giuditta	Guiditta
Jovetta	Giuditta
Giuditta di Giovanni Petrocelli Spina	Guiditta Petrocelli
Sunda	Assunta
6 years old July, 1913	10 years old August, 1914.

We certainly submit that there is neither pleading nor proof that Giuditta di Giovanni Petrocelli or Assunta Spina are citizens of Italy.

But counsel claim that the removal proceeding was our "handiwork" and alleged the citizenship. It alleged the citizenship of *Jovetta Spino and Sunda Spino,* heirs of Peter Spino. It did not allege the citizenship of the parties named in the amended complaint.

Counsel next refer to cases holding that a person sued in the federal court may waive the objection that he is sued *in the wrong district,* and consequently if he removes the case into the federal court he can not subsequently claim that it was improperly removed thereto because it could not have been originally brought in the court of the particular district. This is a waiver of the jurisdiction over the person. Jurisdiction based on diversity of citizenship can not be conferred by consent as is shown by the authorities cited in our brief.

But counsel say no new cause of action was stated by filing the amended complaint, and we having consented to the filing must have taken that view. The cause of action was the same, but the beneficial interest in the recovery was in favor of different people. It is unnecessary to determine whether of right the complaint could be amended by changing the allegation as to heirship. It having been done by consent, no one can question it. But it having been done, properly or improperly, it was necessary to show that the claim was within the jurisdiction of the court. Counsel evidently took this view for they alleged the *residence* of the

heirs. It is no fault of ours that they did not allege their *alienage.*

V.

EVIDENCE OF PREVIOUS ACT OF NEGLIGENCE.

The principal answer to this error is a criticism of the assignments of error. The assignments of error were filed before the bill of exceptions was settled, and as often happens the evidence set forth therein differs in form from that in the bill of exceptions, but assignments I to IV clearly apply to the evidence admitted over our objection and found at pages 39-40. The claim that the objection that the evidence was "immaterial to any issue in the case", and had "no possible relation with anything that took place on the first day of July, when the injury occurred", is too general seems to us to be unfounded. When the objection goes to the entire materiality of the testimony to the issues this is the only form of objection that can be used. The cases counsel refer to are cases where the evidence is relevant, but some technical defect or lack or foundation is relied upon.

VI.

ERROR IN SUBMITTING TO JURY ABSOLUTE LIABILITY FOR VICIOUS ANIMAL.

Counsel make no real attempt to justify a recovery on this ground, and practically abandon the claim that the animal was of that character, but claim that it was of such a character that it needed "attention". Most

horses do, but that does not make the owner liable *as an insurer* of their conduct, as the court instructed the jury was the law when the animal was vicious.

VII.

CONTRIBUTORY NEGLIGENCE.

On this subject counsel admit that our instructions under section 1 of the Roseberry Act were correct, but state that we admit that no gross negligence was charged and therefore it was unnecessary to instruct upon it. We are unable to find in our brief any such admission. Counsel also claim that there are no degrees of negligence. The Roseberry Act refers to the case "where his contributory negligence was *slight* and that of the employer was *gross*, in comparison". Whatever this may mean, we were entitled to have the law thus laid down given to the jury. Whether the legislature intended to give life to *degrees* of negligence as laid down by some courts and repudiated by others, or to simply lay down a rule of *comparative* negligence, it is unnecessary to determine; but it is clear that the legislature intended to abolish the plea altogether in some cases, and divide the responsibility in others, and we were entitled to have the jury so instructed. Counsel quote Judge Thompson, as follows:

> " 'This doctrine, which visits upon the plaintiff or person injured, all the consequences of the defendant's negligence, although the plaintiff's negligence might have been slight and trivial, and that of the defendant gross and wanton, is cruel and wicked and shocks the ordinary sense of justice of mankind.

> Such a rule finds no proper place in an enlightened system of jurisprudence.' "

Still counsel say an instruction which misstated the law in our favor, but in a manner which *"is cruel and wicked and shocks the ordinary sense of justice of mankind"* and *"finds no proper place in an enlightened system of jurisprudence"*, could not be hurtful to us. Such an argument overlooks the human side of the jury system, and assumes that the jury would be as ready to enforce a defense which is cruel and wicked and shocks the ordinary sense of justice, as it would be to enforce a defense based on a law which now forms a part of our enlightened system of jurisprudence.

But counsel say that section one of the Roseberry Act was not applicable. It is applicable to every case of contributory negligence by the employee and lays down the rules of law applicable thereto.

VIII and IX.

Counsel attempt no real answer to either of these propositions.

X.

TECHNICAL OBJECTIONS.

Counsel make certain technical objections to the consideration of the errors relied upon which we shall briefly consider:

1. The objections to the form of the assignments of error we have already considered.

2. The suggestion that error in refusing instructions can not be considered because the entire charge is not set out has no foundation, for even at the risk of violation of rule 10 of this court we did set forth in the bill of exceptions the entire charge of the court (Rec., pp. 114-123).

3. Counsel next claim that our motion for a peremptory instruction in favor of defendant was waived. This motion was made *after* all the evidence was in (Rec., p. 114). The cases cited by counsel all relate to a motion for nonsuit made at the completion of the evidence of plaintiff and which is waived by subsequently putting in evidence. It is a curious contention that a motion made after all the evidence of both parties is in is waived by evidence put in *before* the motion is made.

4. A more serious but less conscionable objection is that the exception to instructions can not be considered because not made at the time the same were given. Under the state law instructions are deemed excepted to (C. C. P., sec. 647) and on the trial the parties stipulated that the state law should govern (Rec., p. 129). The following stipulation was also entered into while the jury was still in the box:

> "After the court charged the jury, and while the jury was still in the box, the following stipulation was entered into in open court at the suggestion of the court with regard to the taking of exceptions to the giving of its instructions and refusal of instructions requested:

> "The Court. The rule of court requiring exceptions to be noted at the time—it is generally the practice to waive that and allow the exceptions to be taken at a subsequent time. Will you stipulate that may be done?
>
> "Mr. Dunne. Yes, your Honor, if it is agreeable to counsel on the other side.
>
> "Mr. Short. Yes."
>
> (Rec., p. 129.)

Counsel, with an assumption of innocence which poorly fits them, complain that the court treated this as a stipulation (Brief, p. 37). The court did treat it as a stipulation and a stipulation which counsel could not with honor repudiate. We treated it as a stipulation and the judge's direction as an order as to the conduct of the trial, and the attempt of counsel to repudiate it has been the cause of almost shattering our idea that the stipulations and agreements of counsel made in open court are the highest type of gentlemen's agreements. We are aware of the strict rules that this court has adhered to on this subject, but we still venture to hope that this court will find some way of holding that, when the parties have stipulated to a form of exception, and the trial judge not only then, but in settling a bill of exceptions has shown that he is satisfied that the method followed has caused no wrong to the parties or the court, a rule, based on the assumed right of the trial judge to be protected from pitfalls, shall not be used to authorize the repudiation of a solemn stipulation. The rule itself is a rule adopted in "fairness to the court which makes the ruling complained of" (*Mountain Copper Co. v. Van Buren,* 133 Fed. 1, 8) and while this court may not be "*bound* to consider"

exceptions taken in any other manner (Id., p. 8), we know of no decision of this court holding that it is powerless to do so. As was said by Taft, C. J., in

Johnson v. Garber, 73 Fed. 523, 527:

> "It does not appear that the defendant's counsel made any agreement by which the exceptions reserved at the time of tendering the bill of exceptions should be considered as having been made at the time of the trial. If such an agreement had been made, it might possibly have been the duty of the court below to enforce it by making the bill of exceptions show that the exceptions were reserved at the time of the trial, on the ground that any other bill of exceptions would be *a fraud upon the party misled by such agreement.*"

Nor is there any decision preventing this court from adopting the view of Noyes, C. J., in *Mann v. Dempster,* 179 Fed. 837, 839, and 181 Fed. 76, 82, that the action of the trial court in adopting a rule of practice which deprives a party of his exceptions is itself a ground of reversal without formal exception. No court should willingly make it possible that a "fraud" be perpetrated. That *form* should control *substance* has never been, and we trust never will be the aim of this court, and there should be nothing so sacred in a rule of court that it can not be abrogated by agreement of the parties, and the judge of the court, at least to the extent of *permitting* this court to give its approval to such abrogation, when the character of the instructions excepted to go to the very meat and substance of the case.

We ask the court to note that in the Southern District this judge states that it is generally the practice

to waive the rule requiring exceptions to be noted at the time the instructions are given (Rec., p. 129). This is the fact and the practice is to allow the exceptions in the bill as if so taken. In other words, the attorneys observe the stipulation. An attorney should not be permitted to take advantage of a practice and then deprive the other party of the benefit thereof, and the finding of the trial court that counsel are estopped from doing so (Rec., p. 131) should be followed by this court.

Respectfully submitted,

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